

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DARRYL LEROY STEWART, JR.,

Petitioner,

No. CIV S-03-2670 FCD DAD P

vs.

D. L. RUNNELS, Warden, et al.,

Respondents.

FINDINGS & RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a 2001 judgment of conviction entered against him on June 11, 2001, in the Tehama County Superior Court on the charge of second degree murder. He seeks relief on the grounds that his trial counsel rendered ineffective assistance. Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner's application for habeas corpus relief be denied.

PROCEDURAL AND FACTUAL BACKGROUND¹

On November 15, 2000, an information was filed, charging defendant Darryl Leroy Stewart, Jr., with first degree murder (Pen.

¹ The following summary is drawn from the February 18, 2003 opinion by the California Court of Appeal for the Third Appellate District (hereinafter Opinion), at pgs. 1-2, filed in this court on May 12, 2004, as Exhibit D to the respondents' Answer.

Code, § 187, subd. (1)) with a special circumstance allegation that the murder was committed while lying in wait (Pen. Code, 190.2, subd. (1)(15)) and with a firearm enhancement (Pen. Code, § 12022, subd. (a)(1)).

On May 8, 2001, defendant pleaded no contest to second degree murder; the special circumstance allegation and the enhancement were dismissed.

The following month, defendant moved to withdraw his plea based solely upon his declaration that stated in conclusory fashion that he was pressured into taking the plea, that he had failed to understand “what was happening,” and that he was on antidepressant medication. The motion, which was submitted on the moving papers, was denied, and defendant was sentenced to state prison for a term of 15 years to life.

ANALYSIS

I. Standards of Review Applicable to Habeas Corpus Claims

A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860, 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377 (1972).

This action is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003). Section 2254(d) sets forth the following standards for granting habeas corpus relief:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001).

The court looks to the last reasoned state court decision as the basis for the state court judgment. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under section 2254(d). Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000). When it is clear that a state court has not reached the merits of a petitioner's claim, or has denied the claim on procedural grounds, the AEDPA's deferential standard does not apply and a federal habeas court must review the claim de novo. Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

II. Ineffective Assistance of Trial Counsel

Petitioner's sole claim is that his trial counsel rendered ineffective assistance. After setting forth the background and applicable legal principles, the court will analyze this claim below.

A. Background

On May 8, 2001, petitioner pled no contest to a single charge of second degree murder. (Reporter's Transcript on Appeal (RT) at 73-74.) On June 1, 2001, petitioner filed a motion to withdraw his plea of no contest and a declaration in support of the motion. (Clerk's Transcript on Appeal (CT) at 385.) Therein, he argued that he should be allowed to withdraw his plea because: (1) at the time he entered the plea he "felt pressure to take the offer and the plea

1 was “not the product of [his] own free will;” (2) he took “antidepressant medication” the evening
2 prior to the entry of his plea; and (3) he “misunderstood what was happening” at the change of
3 plea hearing.” (Id. at 383.)

4 Petitioner’s motion to set aside his plea was heard on June 11, 2001. (RT at 87.)
5 At the beginning of the hearing, the trial judge announced that the matter had been continued to
6 allow the prosecutor to file a response and to allow petitioner’s trial counsel to file “any
7 additional declarations to support her motion.” (Id.) Petitioner’s counsel stated that she had no
8 additional evidence. (Id.) The motion was submitted on the papers filed. (Id.) Before
9 announcing his ruling on the motion, the trial judge noted that he had engaged in a lengthy and
10 complete colloquy with petitioner at the change of plea hearing. (Id. at 87-89.) Petitioner’s
11 motion to set aside his plea was denied and petitioner was sentenced to fifteen-years-to life in
12 state prison. (CT at 401.)

13 On June 26, 2001, petitioner’s trial counsel filed a timely notice of appeal on his
14 behalf. (Id. at 403.) On the appeal form, counsel checked a box indicating that the issues to be
15 raised on appeal were based on petitioner’s sentence or other matters occurring after his plea.
16 (Id.) Counsel did not check the box indicating that the appeal issues related to the validity of the
17 plea, nor did she request a certificate of probable cause which was required in the event that the
18 appeal challenged the validity of the plea. (Id.)

19 On or about October 9, 2001, petitioner’s appellate counsel filed an “application
20 for relief from default and permission to amend notice of appeal and to seek certificate of
21 probable cause to appeal.” (Answer, Ex. A.) Therein, it was noted that the notice of appeal filed
22 by petitioner’s trial counsel had not sought to challenge the entry of his plea or the trial court’s
23 denial of his motion to withdraw the plea. (Id. at 2.) Petitioner informed the court that he now
24 sought to challenge “the plea’s entry and/or denial of its withdrawal, which may arguably
25 challenge its validity and require a certificate of probable cause to appeal.” (Id.) Petitioner’s
26 application was summarily denied by order dated November 1, 2001. (Id.)

1 On appeal, petitioner claimed that his trial counsel rendered ineffective assistance
2 because a conflict of interest prevented her from adequately preparing and vigorously arguing the
3 motion to withdraw his guilty plea and led to her decision not to appeal the validity of the plea.
4 (Answer, Ex. B.) Petitioner argued that his trial counsel had improperly coerced him to accept
5 the guilty plea and that, in order to prevent this fact from coming to light, she effectively
6 sabotaged any attempt on his part to challenge the plea. (Id.) He insinuated that his trial counsel
7 deliberately chose not to request a certificate of probable cause in order to foreclose appellate
8 review of the validity of the plea. (Id. at 7.) Petitioner argued that “there was a clear conflict
9 between appellants’ presenting and prevailing in his plea withdrawal claim and counsel’s interest
10 in protecting herself from the damage such an outcome could or would do to her professional
11 reputation and bar discipline exposure.” (Id. at 9.) He further argued, “the conflict’s adverse
12 effect was shown both by counsel’s submission of the facially insufficient motion without
13 additional evidence, without appellant’s opportunity to be heard personally, without argument,
14 and the failure to obtain a certificate of probable cause to appeal that procedurally foreclosed the
15 motion denial’s appellate review.” (Id. at 10.)

16 The California Court of Appeal construed the issues presented by petitioner on
17 appeal as follows: “On appeal, as best we are able to determine, defendant contends that as a
18 result of a potential or actual conflict of interest, his trial counsel was ineffective in (1) preparing
19 and presenting his motion to withdraw his plea, and (2) failing to obtain a certificate of probable
20 cause to preserve the first issue for appeal.” (Opinion at 2.) The appellate court rejected both of
21 these arguments, as so construed. First, the court found, as a matter of state law, that a certificate
22 of probable cause pursuant to California Penal Code § 1237.5 was required in order to appeal

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1 because the claims raised therein challenged the validity of petitioner's plea.² (Id. at 2-5.) The
2 state appellate court also concluded that the record was insufficient to demonstrate that
3 petitioner's trial counsel rendered ineffective assistance when she failed to obtain a certificate of
4 probable cause. The appellate court explained its reasoning in this regard as follows:

5 Further, a claim of ineffective assistance – in this case, in failing to
6 procure a certificate of probable cause – is not properly considered
7 on appeal where the record does not show why counsel failed to act
8 in the manner challenged, unless counsel was asked for an
9 explanation and failed to provide one, or unless there simply could
be no satisfactory explanation. (See People v. Mendoza Tello,
(1997) 15 Cal.4th 264, 266.) The record is not sufficient here upon
which to base a claim that counsel was ineffective in failing to
procure a certificate.

10 (Id. at 5.)

11 On March 20, 2003, petitioner filed a petition for review in the California
12 Supreme Court. (Answer, Ex. E.) That petition was summarily denied by order dated April 30,
13 2002. (Answer, Ex. F.)

14 In the petition before this court, petitioner raises the following claim:

15 Defense counsel's failure to obtain a certificate of probable cause
16 to appeal following denial of the motion to withdraw the plea
17 violated appellant in the appeals dismissal, violating his 6th and
14th Amendments., I.A.C.

18
19 ² California Penal Code § 1237.5 provides:

20 No appeal shall be taken by the defendant from a judgment of
21 conviction upon a plea of guilty or nolo contendere, or a revocation
of probation following an admission of violation, except where
both of the following are met:

22 (a) The defendant has filed with the trial court a written statement,
23 executed under oath or penalty of perjury showing reasonable
constitutional, jurisdictional, or other grounds going to the legality
24 of the proceedings.

25 (b) The trial court has executed and filed a certificate of probable
26 cause for such appeal with the clerk of the court.

Defense counsel was ineffective because a challenge to the plea required a necessary certificate of probable cause to appeal which was not obtained. Appellant instructed counsel to initiate an appeal and reasonably relied upon counsel to file the necessary notice. Counsel performed unreasonably by failing to follow the Appellant's express instructions with respect to an appeal. Appellant was entitled to the effective assistance of counsel in obtaining a certificate of probable cause to appeal in the trial court, a prejudicial violation of the effective assistance guaranteed by the Sixth and Fourteenth Amendments.

(Pet. at 5.)

In his traverse, petitioner raises a substantive challenge to the validity of his guilty plea. He states that his trial counsel induced him to plead no contest by telling him, falsely, that his co-defendant had entered into a plea agreement and intended to testify against him. (Traverse at 1.)³ Petitioner also complains that his trial counsel "presented the downside of going to trial and that the jury would find me guilty" and that she convinced him to enter a plea even though he did not commit the actual shooting. (*Id.* at 1, 3.) Petitioner states that when he found out his co-defendant was not going to testify against him, he asked his trial counsel to withdraw his plea. (*Id.*) Petitioner also contends, as he did in state court, that his trial counsel deliberately chose not to seek a certificate of probable cause because she did not want to expose the fact that she improperly coerced petitioner to plead guilty. (*Id.* at 5.) Petitioner submits evidence that his trial counsel assisted him with the filing of a petition for a writ of habeas corpus in state court, arguing that this demonstrates she knew she had provided ineffective assistance. (Traverse, Exs. A-C.) Petitioner summarizes the arguments set forth in his traverse as follows:

Petitioner has shown that trial counsel failed to be truthful with him prior to his pleading no contest, failed to withdraw his plea in a timely manner, failed to file a request for a certificate of probable cause, and then failed to object to the judge's representation of Petitioner's role in the crime. Taken alone they may amount to

³ Petitioner informs the court that "two possibly three declarations from witnesses" will be provided to support his contention that his trial counsel falsely told him that his co-defendant had agreed to testify against him. (*Id.* at 6.) No such declarations have been filed.

1 harmless error, but cumulatively they rise to the level of Strickland
2 ineffective assistance.

3 (Traverse at 9.)

4 Relying on the decision in Roe v. Flores-Ortega, 528 U.S. 470 (2000),
5 respondents argue that petitioner's counsel did "all that was required of her" by filing a timely
6 notice of appeal. (Answer at 6.)

7 B. Legal Standards

8 The Sixth Amendment guarantees the effective assistance of counsel. The United
9 States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in
10 Strickland v. Washington, 466 U.S. 668 (1984). To support a claim of ineffective assistance of
11 counsel, a petitioner must first show that, considering all the circumstances, counsel's
12 performance fell below an objective standard of reasonableness. See Strickland, 466 U.S. at
13 687-88. After a petitioner identifies the acts or omissions that are alleged not to have been the
14 result of reasonable professional judgment, the court must determine whether, in light of all the
15 circumstances, the identified acts or omissions were outside the wide range of professionally
16 competent assistance. Id. at 690; Wiggins v. Smith, 539 U.S. 510, 521 (2003).

17 Second, a petitioner must establish that he was prejudiced by counsel's deficient
18 performance. Strickland, 466 U.S. at 693-94. Prejudice is found where "there is a reasonable
19 probability that, but for counsel's unprofessional errors, the result of the proceeding would have
20 been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine
21 confidence in the outcome." Id. See also Williams, 529 U.S. at 391-92; Laboa v. Calderon, 224
22 F.3d 972, 981 (9th Cir. 2000). A reviewing court "need not determine whether counsel's
23 performance was deficient before examining the prejudice suffered by the defendant as a result of
24 the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of
25 lack of sufficient prejudice . . . that course should be followed." Pizzuto v. Arave, 280 F.3d 949,
26 955 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 697).

1 In assessing an ineffective assistance of counsel claim “[t]here is a strong
2 presumption that counsel’s performance falls within the ‘wide range of professional assistance.’”
3 Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (quoting Strickland, 466 U.S. at 689). There
4 is in addition a strong presumption that counsel “exercised acceptable professional judgment in
5 all significant decisions made.” Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing
6 Strickland, 466 U.S. at 689).

7 The Strickland standards apply to appellate counsel as well as trial counsel. Smith
8 v. Murray, 477 U.S. 527, 535-36 (1986); Miller v. Keeney, 882 F.2d 1428, 1433 (9th Cir. 1989).
9 However, an indigent defendant “does not have a constitutional right to compel appointed
10 counsel to press nonfrivolous points requested by the client, if counsel, as a matter of
11 professional judgment, decides not to present those points.” Jones v. Barnes, 463 U.S. 745, 751
12 (1983). Counsel “must be allowed to decide what issues are to be pressed.” Id. Otherwise, the
13 ability of counsel to present the client’s case in accord with counsel’s professional evaluation
14 would be “seriously undermined.” Id. See also Smith v. Stewart, 140 F.3d 1263, 1274 n.4 (9th
15 Cir. 1998) (counsel not required to file “kitchen-sink briefs” because it “is not necessary, and is
16 not even particularly good appellate advocacy.”) There is, of course, no obligation to raise
17 meritless arguments on a client’s behalf. See Strickland, 466 U.S. at 687-88 (requiring a
18 showing of deficient performance as well as prejudice). Thus, counsel is not deficient for failing
19 to raise a weak issue. See Miller, 882 F.2d at 1434. In order to demonstrate prejudice in this
20 context, petitioner must demonstrate that, but for counsel’s errors, he probably would have
21 prevailed on appeal. Id. at 1434 n.9.

22 The United States Supreme Court has identified several situations arising in the
23 context of ineffective assistance of counsel claims, where prejudice may be presumed because
24 the adversary process itself has been rendered presumptively unreliable. As the Ninth Circuit has
25 explained in this regard:

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In Sixth Amendment right to counsel cases, the Supreme Court has presumed prejudice where there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." United States v. Cronic, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Strickland, Cronic, and the cases that follow Cronic have made clear that this exception is limited to the "complete denial of counsel" and comparable circumstances, including: (1) where a defendant "is denied counsel at a critical stage of his trial"; (2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; (3) where the circumstances are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial"; and (4) where "counsel labors under an actual conflict of interest."

Visciotti v. Woodford, 288 F.3d 1097, 1106 (9th Cir. 2002) (quoting Cronic, 466 U.S. at 659-61, 662 n.31), reversed on other grounds by Woodford v. Visciotti, 537 U.S. 19 (2002).

In other types of cases, a "similar, though more limited, presumption of prejudice" has been found to be warranted. Strickland, 466 U.S. at 692. The first type of such cases are those involving attorney conflict of interest, where prejudice will be presumed only if the defendant demonstrates that counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Id. (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). In Roe v. Flores-Ortega, 528 U.S. 470 (2000) the Supreme Court recognized another category of cases warranting this more limited presumption of prejudice. In Flores-Ortega, appellate counsel had failed to file a notice of appeal under circumstances where it was not clear whether his client had asked him to do so. 528 U.S. at 487. The United States Supreme Court held that where a defendant could show that "counsel's deficient performance . . . actually cause[d] the forfeiture of the defendant's appeal" prejudice involves only a showing that "there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." 528 U.S. at 484. The Supreme Court concluded that prejudice is to be presumed under these circumstances "with no further showing from the defendant of the merits of his underlying claims" because "the

1 violation of the right to counsel rendered the [appeal] presumptively unreliable or entirely
 2 nonexistent.” Id.⁴

3 C. Analysis

4 Petitioner has raised several distinct arguments under the umbrella of his general
 5 claim of ineffective assistance of counsel. The first question to be answered is whether trial
 6 counsel’s failure to file the required documents to perfect petitioner’s appeal of his guilty plea
 7 fell below an objective standard of reasonableness. Petitioner alleges only that he asked his trial
 8 counsel to “initiate an appeal,” and does not explain whether he specified to his attorney the
 9 claims he wished to raise on appeal.⁵ (Pet. at 5.) Petitioner’s trial counsel filed a timely notice of
 10 appeal, but failed to request a certificate of probable cause, which was required in order to
 11 challenge the validity of petitioner’s plea. Petitioner baldly asserts that his trial counsel refrained
 12 from requesting the certificate, and thereby foreclosed a challenge to the validity of his plea,
 13 because she wanted to cover up the fact that she had lied to petitioner in order to induce his plea.

14 Petitioner’s contention in this regard is unsupported by any evidence in the record
 15 and his bare allegation is insufficient to establish that his counsel’s performance was deficient or
 16 influenced by a conflict of interest. On the contrary, as pointed out by the California Court of
 17 Appeal, there is no evidence whatsoever in the record regarding counsel’s reasons for not
 18 requesting a certificate of probable cause. It is entirely possible that trial counsel did not seek to
 19 challenge the validity of petitioner’s plea because she believed that any such claim lacked merit.
 20 In this regard, counsel’s motion to set aside petitioner’s plea had already been denied by the trial

21
 22 ⁴ Whether a defendant must show actual prejudice or whether prejudice is presumed
 23 “turns on the magnitude of the deprivation of the right to effective assistance of counsel.” Roe v.
 24 Flores-Ortega, 528 U.S. 470, 482 (2000). This is because the right to effective assistance of
 counsel “is recognized not for its own sake, but because of the effect it has on the ability of the
 accused to receive a fair trial . . . or a fair appeal.” Id. (citations omitted).

25 ⁵ Here, petitioner claims that his trial counsel “performed unreasonably by failing to
 26 follow the Appellant’s [sic] express instructions with respect to an appeal.” (Pet. at 5.)
 Petitioner does not explain what he means by this statement and the court will not speculate as to
 petitioner’s meaning.

1 court. This court must presume that counsel “exercised acceptable professional judgment” in her
2 handling of the notice of appeal. Hughes, 989 F.2d at 702. See also Kimmelman, 477 U.S. at
3 381; Strickland, 466 U.S. at 689. Petitioner’s conclusory and unsupported allegations regarding
4 counsel’s motives are insufficient to rebut that strong presumption. See Jones v. Gomez, 66 F.3d
5 199, 204 (9th Cir. 1995) (“It is well-settled that ‘[c]onclusory allegations which are not supported
6 by a statement of specific facts do not warrant habeas relief’”) (quoting James v. Borg, 24 F.3d
7 20, 26 (9th Cir. 1994)).

8 Even assuming arguendo that counsel’s failure to obtain a certificate of probable
9 cause constituted deficient performance, the next question would be whether petitioner’s claim
10 implicates a more limited form of presumed prejudice under the holding in Flores-Ortega or
11 instead is to be reviewed under the generally applicable actual prejudice standard. If the
12 presumption of prejudice exists under these circumstances, petitioner is arguably entitled to
13 habeas relief because he claims that, but for his counsel’s error, he would have filed a timely
14 appeal raising the claim that his plea was involuntary. (Traverse at 9.) If the general prejudice
15 standard applies, petitioner is not entitled to relief because, as will be explained below, the claim
16 he wished to raise on direct appeal lacks merit.

17 First, petitioner has failed to demonstrate that he suffered a “complete denial of
18 counsel” due to his attorney’s alleged conflict of interest that caused her to sabotage his challenge
19 to his guilty plea. See Strickland, 466 U.S. at 692. For the reasons described above, petitioner’s
20 unsupported claims regarding counsel’s possible motive in failing to seek a certificate of
21 probable cause are insufficient to establish a conflict. Put another way, petitioner has failed to
22 demonstrate that “an actual conflict of interest adversely affected his lawyer’s performance.” Id.⁶
23 Accordingly, prejudice may not be presumed on this basis.

24
25 ⁶ As described above, petitioner also contends that this “conflict” also prevented his trial
26 counsel from adequately presenting and arguing the motion to withdraw plea filed on his behalf
in the trial court. This unsupported argument should be rejected for the same reasons.

1 Nor does the decision in Flores-Ortega require a presumption of prejudice here.
2 In that case the Supreme Court noted that counsel's deficient performance in failing to file a
3 notice of appeal deprived the defendant of "more than a fair judicial proceeding; that deficiency
4 deprived [defendant] of the appellate proceeding altogether." 528 U.S. at 483. The Supreme
5 Court concluded that the presumption of prejudice applied because the violation of the right to
6 counsel had rendered the proceeding (the appeal) entirely nonexistent. Id. at 484. In that context
7 the Supreme Court stated:

8 We similarly conclude here that it is unfair to require an indigent,
9 perhaps pro se, defendant to demonstrate that his hypothetical
10 appeal might have had merit before any advocate has ever
11 reviewed the record in his case in search of potentially meritorious
12 grounds for appeal. Rather, we require the defendant to
13 demonstrate that, but for counsel's deficient conduct, he would
14 have appealed.

12 Id. at 486. Thus, in Flores-Ortega the petitioner's claims were never formulated in the first
13 instance due to his counsel's failure to file a notice of appeal. As a result, there was no basis
14 upon which to make a finding with respect to actual prejudice.

15 Here, on the contrary, petitioner received the benefit of the services of appointed
16 appellate counsel in constructing and presenting his arguments challenging his judgement of
17 conviction on appeal. Petitioner's claims were fully briefed to the state appellate court. In
18 addition, in response to his petition for writ of habeas corpus, petitioner received a ruling from
19 the California Court of Appeals on the merits of his claim of ineffective assistance of counsel.
20 (See Opinion at 5.) Unlike the situation in Flores-Ortega, petitioner in this case was not deprived
21 of an "appellate proceeding altogether." 528 U.S. at 483. In addition, this court is in a position
22 to make a determination with respect to actual prejudice, or the likelihood of success of
23 petitioner's claims on appeal, because those claims have been articulated by petitioner's
24 appointed counsel on appeal in state court and have been ruled upon in state habeas proceedings.
25 Thus, contrary to the situation presented in Flores-Ortega, an inquiry into actual prejudice in this
26 case is entirely possible.

1 The decision in Kitchen v. United States, 227 F.3d 1014 (7th Cir. 2000) is
 2 instructive on this issue. In that case the petitioner was convicted following a jury trial and his
 3 attorney filed a timely notice of appeal on his behalf. 227 F.3d at 1016. While that direct appeal
 4 was pending, petitioner's attorney filed a motion for a new trial with the trial court based upon a
 5 claim of newly discovered evidence. Id. at 1017. The briefing on the direct appeal was stayed to
 6 allow the trial court to consider the motion for a new trial. Id. After the trial court denied the
 7 motion, petitioner's counsel inadvertently failed to file a notice of appeal thus precluding the
 8 appellate court's review of the denial of the motion for a new trial. Id. Petitioner then
 9 collaterally attacked his conviction claiming he had been denied his right to effective assistance
 10 of counsel when his counsel failed to file a notice of appeal following the denial of his motion for
 11 a new trial. Id. On appeal from the trial court's denial of relief, petitioner argued that under the
 12 holding in Flores-Ortega he was entitled to a presumption of prejudice flowing from his
 13 counsel's failure to file a notice of appeal. Id. at 1020. Finding the question a close one, the
 14 court in Kitchen nonetheless rejected petitioner's presumption of prejudice argument. Id. In so
 15 ruling the court observed:

16 For in those cases in which the Supreme Court, as well as this and
 17 other circuits, have presumed prejudice from the failure to file a
 18 notice of appeal, defendants have had no assistance of counsel for
 19 any issues. [citations omitted]. Therefore, a presumption of
 20 prejudice has arisen when the defendant was hampered by "the
 21 complete denial of counsel," Flores-Ortega, 120 S.Ct. at 1038
 22 (emphasis added), meaning that "the defendant never receive[d] the
 23 benefit of a lawyer's services in constructing potential appellate
 24 arguments," Castellanos [v. United States], 26 F.3d [717,] 718 [7th
 25 Cir. 1994] (emphasis added). When "[n]o one has looked at the
 26 record with an advocate's eye," id., possible arguments on appeal
 are not even identified by an attorney, and it would be difficult for
 a court to evaluate the likelihood of success on appeal when the
 potential issues on that appeal were never identified. Cf.
Castellanos, 26 F.3d at 718 (noting that although judges can
 "conscientiously" try "to imagine what a lawyer might have done,
 an advocate often finds things that an umpire misses.").
 Here, however, we need not employ our imaginations to determine
 what appealable issues were present in Kitchen's case. His counsel
 filed a timely notice of appeal from Kitchen's conviction and
 sentence and argued several issues before this court on direct

1 appeal--some with success. Thus, one cannot characterize such a
2 situation as one in which Kitchen was "abandoned" by his attorney
3 or the denial of counsel on appeal was "complete." His attorney's
4 deficient performance did not "deprive[] [Kitchen] of the appellate
5 proceeding altogether." Flores-Ortega, 120 S.Ct. at 1038. Rather,
6 Kitchen's counsel, through his deficient performance, foreclosed
7 our review of one issue--whether Kitchen was entitled to a new
8 trial on the basis of newly discovered evidence. This is unlike the
9 situation in which the possible issues on appeal have not even been
10 identified by an advocate, and prejudice must be presumed. See,
11 e.g., Penson v. Ohio, 488 U.S. [75,] 88, 109 S.Ct. 346 [1988].
12 Here, the abandoned issue has been clearly defined, and no reason
13 has been offered why any prejudice resulting from its abandonment
14 may not be reliably determined.

15 227 F.3d at 1021. The same is true here for the reasons noted above.

16 Finally, in concluding that no presumption of prejudice applies under these
17 circumstances the court is persuaded by a recent district court decision addressing a strikingly
18 similar claim. In Briseno v. Woodford, No. C 04-1458 PJH, 2007 WL 2726803 (N.D. Cal. Sept.
19 17, 2007), the petitioner had entered a plea of guilty in state court and then unsuccessfully moved
20 to withdraw that plea prior to sentencing. In his federal habeas petition he claimed that his trial
21 counsel was ineffective in improperly persuading him to plead guilty and in failing to obtain a
22 certificate or probable cause from the trial court, thus precluding him from challenging on appeal
23 the denial of his motion to withdraw his plea. 2007 WL 2726803 at *5, 18. In rejecting this
24 ineffective assistance of counsel claim, the district court addressed the applicability of the
25 decision in Roe v. Flores-Ortega, stating as follows:

26 Because there do not appear to be any United States Supreme
Court or Ninth Circuit cases directly on point, the court finds that
the above legal standards pertaining to notices of appeal are
instructive. However, the court notes that this case differs from
Roe and Ninth Circuit cases interpreting Roe because, following
consultation with [petitioner] and at least partially in accordance
with [petitioner's] desires, [trial counsel] did draft a notice of
appeal from the sentence imposed for [petitioner] to file pro se,
which [petitioner] did. Unlike the other cases, what is at issue is
counsel's alleged failure to file the document-a request for a
certificate of probable cause-required under California law for
[petitioner] to appeal additional issues related to the validity of his
guilty plea.

1 * * *

2 [B]ased on this court's review of the record, it appears that [trial
3 counsel] believed that [petitioner's] only viable claims pertained
4 to his sentence and communicated this to him. Given the record, it
5 would not have been deficient performance for [trial counsel] to
6 determine that a trial court would not grant a certificate of probable
7 cause as to other issues related to the validity of [petitioner's] plea,
8 nor would it have been deficient performance for [trial counsel] to
9 simply file a notice of appeal as to these claims.

10 Nevertheless, even if this court were to credit [petitioner's] recent
11 statement that he did in fact request [trial counsel] to file the
12 documents necessary for him to appeal the competency
13 determination and the trial court's denial of his motion to withdraw
14 his plea, thereby leading to a conclusion that [trial counsel's]
15 failure to file a request for the certificate was deficient, the court
16 concludes that [petitioner] has not demonstrated prejudice.

17 It is in evaluating prejudice that the failure to file notice of appeal
18 cases provide less guidance. Unlike those cases involving counsel's
19 failure to file a notice of appeal, in this case, had [trial counsel]
20 filed a request for a certificate of probable cause, an appeal of those
21 issues would not have been automatic. Instead, the state trial court
22 would have been afforded an opportunity to review the request, and
23 to deny the request if in its discretion it determined that the issues
24 were frivolous or vexatious. Accordingly, in evaluating the
25 prejudice issue, this court must consider the likelihood that the
26 state court would have found the claims [petitioner] asserts that he
would have raised, frivolous or vexatious.

* * *

[T]he court concludes that [petitioner] is unable to demonstrate
prejudice because it is highly probable that the state trial court
would have denied a certificate of probable cause as to the above
potential issues, and thus [petitioner] would not have been
permitted to appeal those issues anyway. This is because the trial
court would very likely have concluded, given the record, that the
above issues were frivolous and/or vexatious.

Briseno, 2007 WL 2726803, *20 -22.

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1 Accordingly, the court finds that the presumption of prejudice does not apply
2 under these circumstances.⁷

3 Turning then to application of the general prejudice standard, in this case
4 petitioner has failed to demonstrate that, but for counsel's failures, he would have prevailed on
5 appeal. See Strickland, 466 U.S. 694; Keeney, 882 F.2d at 1433. To the extent petitioner's
6 ineffective assistance of counsel claim is based on his trial counsel's failure to seek a certificate
7 of probable cause allowing him to challenge the denial of his motion to withdraw his plea, he has
8 not established prejudice. As noted above, counsel's motion to set aside petitioner's plea had
9 already been denied by the trial judge who recited in some detail his reasons for doing so. (See
10 RT at 87-89.) It is highly probable that the trial court would have declined to issue a certificate
11 of probable cause as to any attempt to challenge the denial of the motion to withdraw plea on the
12 grounds of frivolousness. See Briseno, 2007 WL 2726803, *16, 22. Thus, petitioner would not
13 have been permitted to obtain review of such issues on appeal even if his counsel had sought the
14 certificate of probable cause. Id. at *22.⁸

15
16 ⁷ The court is compelled to note the holding in Evitts v. Lucey, 469 U.S. 387 (1985). In
17 that case the defendant's retained counsel filed a timely notice of appeal in state court following
18 his client's conviction but failed to file a statement of appeal with his brief as required by the
19 state rules of appellate procedure. Id. at 389. When the state filed its brief it also moved to
20 dismiss the appeal due to counsel's failure to file the statement of appeal. The state appellate
21 court granted the motion and dismissed the appeal. Id. at 390. The issue before the Supreme
22 Court in Evitts was "whether the state court's dismissal of the appeal, despite the ineffective
23 assistance of [the defendant's] counsel on appeal, violates the Due Process Clause of the
24 Fourteenth Amendment." Id. at 391-92. After pointing out the various alternatives available to
25 the state court short of dismissing the appeal, the Supreme Court concluded that Lucey had been
26 denied his right to due process. Id. at 399-400 ("A State may not extinguish this right because
another right of the appellant--the right to effective assistance of counsel--has been violated.")
See also Bonneau v United States, 961 F.2d 17 (1st Cir. 1992) (under Evitts a defendant who lost
his right to a direct appeal through the dereliction of his counsel was entitled to a new appeal
without a showing that there was a meritorious appellate issue). However, the petition before
this court does not set forth a due process claim based upon the state court's dismissal of the
appeal and no such claim has been exhausted in state court. Rather, the only claim pending
presented here is one based on petitioner's allegation of ineffective assistance of counsel.

25 ⁸ As noted above, the California Court of Appeal also denied petitioner's application for
26 relief from default by which he sought to challenge on appeal the entry of his plea and/or the
denial of its withdrawal. (Answer, Ex. A.)

1 Finally, petitioner has failed to establish prejudice with respect to any ineffective
2 assistance of counsel claim he may be presenting with respect to the entry of his plea. In this
3 regard, a guilty plea must be knowing, intelligent and voluntary. Brady v. United States, 397
4 U.S. 742, 748 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969). "The voluntariness of [a
5 petitioner's] guilty plea can be determined only by considering all of the relevant circumstances
6 surrounding it." Brady, 397 U.S. at 749. In Blackledge v. Allison, 431 U.S. 63 (1977), the
7 Supreme Court addressed the presumption of verity to be given the record of plea proceeding
8 when the plea is subsequently subject to a collateral challenge. While noting that the defendant's
9 representations at the time of his guilty plea are not "invariably insurmountable" when
10 challenging the voluntariness of his plea, the Supreme Court stated that, nonetheless, the
11 defendant's representations, as well as any findings made by the judge accepting the plea,
12 "constitute a formidable barrier in any subsequent collateral proceedings" and that "[s]olemn
13 declarations in open court carry a strong presumption of verity." Id. at 74. See also Marshall v.
14 Lonberger, 459 U.S. 422, 437 (1983) (plea presumed valid in habeas proceeding when pleading
15 defendant was represented by counsel); Little v. Crawford, 449 F.3d 1075, 1081 (9th Cir. 2006);
16 Chizen v. Hunter, 809 F.2d 560, 561 (9th Cir. 1986).

17 The state court record reflects that petitioner's plea of no contest was voluntarily
18 made, with knowledge of the consequences thereof. There was a full and complete colloquy
19 between the trial court and petitioner at the time he entered his plea. (RT at 74-81.) Of particular
20 relevance to the claim before this court, petitioner stated that no promises had been made to
21 induce him to accept the plea agreement (id. at 75), that he did not need any more time to talk to
22 his trial counsel about the plea agreement (id.), that he did not have "any questions" (id.), that he
23 was not under any medication that would prevent him from understanding the proceedings (id. at
24 76), and that he had gone over the plea agreement with his trial counsel and she had answered all
25 of his questions. (Id.). In addition, petitioner voluntarily waived his rights to a jury trial, to
26 confront his accusers, and to his right against self-incrimination. (Id. at 79-80.) See Boykin, 395

1 U.S. at 243. Petitioner also had notice of the nature of the charges against him. (RT at 73.) See
 2 Lonberger, 459 U.S. at 436 (in order for a plea to be voluntary, an accused must receive notice of
 3 the nature of the charge against him, “the first and most universally recognized requirement of
 4 due process”) (quoting Smith v. O’Grady, 312 U.S. 329, 334 (1941)). At the end of the plea
 5 colloquy, the trial court found that petitioner’s plea was “free and voluntary, knowing and
 6 intelligent, [and] he has been advised on the consequences of the plea.” (RT at 81.) Although
 7 petitioner states that he was induced to enter the plea based on misrepresentations made by his
 8 trial counsel, he has failed to substantiate that bald assertion. Thus, for the reasons set forth
 9 above, petitioner has failed to demonstrate that he would have prevailed on a claim that his plea
 10 was not voluntarily entered.⁹

11 For all the reasons set forth above, this court concludes that petitioner has not
 12 shown that counsel’s performance fell below an objective standard of reasonableness nor has
 13 petitioner demonstrated prejudice with respect to his ineffective assistance of counsel claim.
 14 Accordingly, the denial of relief by the state courts was neither contrary to, or an unreasonable
 15 application of, clearly established federal law.

16 CONCLUSION

17 Accordingly, IT IS HEREBY RECOMMENDED that petitioner’s application for
 18 a writ of habeas corpus be denied.

19 These findings and recommendations are submitted to the United States District
 20 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
 21 days after being served with these findings and recommendations, any party may file written
 22

23 ⁹ This court also notes that an appellate counsel must be allowed to decide what issues
 24 are to be presented on appeal and that a criminal defendant does not have a constitutional right to
 25 dictate the issues to be raised. Insofar as petitioner’s trial counsel was acting as appellate counsel
 26 when she concluded that there was no meritorious appellate issue related to petitioner’s plea,
 petitioner has failed to demonstrate prejudice. As noted above, there is no obligation to raise a
 meritless argument on a client’s behalf. Strickland, 466 U.S. at 687-88; Miller v. Keeney, 882
 F.2d 1428, 1434 (9th Cir. 1989).

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
3 shall be served and filed within ten days after service of the objections. The parties are advised
4 that failure to file objections within the specified time may waive the right to appeal the District
5 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: October 22, 2007.

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DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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